***United States Court of Appeals***

***for the Second Circuit***


# RESPONDENT'S BRIEF

# NO. 76-4227

## UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL UNIONS NOS. 1212, 4, 45, 202, 1200, 1220 AND 1228, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent,*

and

CBS, INC.,

*Intervenor.*

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether, in light of the Company's special concern with confidentiality, the Board properly found that the Company did not violate Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union in the presence of officials of another labor organization which had no contractual relationship with the Company, which represented none of the

Company's employees, but which did represent employees of the Company's two key competitors in the broadcasting industry.

## COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of the International Brotherhood of Electrical Workers, AFL-CIO, and Locals Nos. 4, 45, 202, 1200, 1212, 1220, and 1228 of the same labor organization (hereinafter the "Union") to review and set aside a Decision and Order of the National Labor Relations Board (A. 271-272).[1/] This Decision, by Members Fanning, Jenkins, and Penello, was issued on October 19, 1976, and is reported at 226 NLRB No. 85. This Court has jurisdiction over this proceeding, pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.), because the Union transacts business within the circuit. Specifically, the Union challenges the Board's affirmation of the Administrative Law Judge's decision (A. 264-270), which recommended dismissal of a complaint (A. 10, 13) alleging that CBS, Inc., (hereinafter the "Company") had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union because of the presence of representatives of another labor organization, the National Association of Broadcast Engineers and Technicians (hereinafter referred to as "NABET").

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1/ "A." references are to the pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## I. THE BOARD'S FINDINGS OF FACT

The Company, which is one of the three major networks engaged in radio and TV broadcastings, has had a bargaining relationship since 1938 with the Union, which has broad jurisdiction over the Company's use of electronic equipment, including cameras. From 1938 to 1951, the bargaining agreements between the Company and the Union basically covered broadcast technicians in the radio industry. In 1951, the Union was certified by the Board to represent a nationwide unit of the Company's broadcast technicians, and in 1952 the Company and the Union entered into an agreement covering both radio and television technicians. Since that time, the Company and the Union have regularly entered into collective bargaining agreements. (A. 265; 147-151, 153.) The facts underlying the Board's decision to dismiss the complaint against the Company are outlined below:

### A. The Company Demonstrates the Need for Confidentiality in its 1972 Negotiations with the Union

In 1972 the Company and the Union entered into a contract expiring on September 30, 1975. (A. 265; 256.) During 1972 negotiations the Company proposed a number of changes in its contractural relationship with the Union. The Company sought these changes to accommodate new developments in electronic technology and to assume leadership in the use of new electronic equipment. (A. 265; 151-158, 161-163.)

The principal change proposed was in the news field, where the Company hoped to convert from newsreel film to electronic news coverage by means of a new, miniaturized electronic camera -- the ENG or mini-cam. 2/ Use of this portable, electronic news gathering device required contract modifications because the existing agreement was designed to cover use of electronic cameras in the studio setting, not at the actual locale of news events. (A. 265; 49, 151-158, 161-163.) The Company also sought changes in the contract to allow for expanded use of new production area technology (A. 265; 151-152, 154-158.)

To establish the legitimacy of these contract proposals, the Company disclosed to the Union confidential information about the new electronic devices available to the Company and about its business plans for their utilization. The Company revealed technical data that was not generally available in the industry, and, with the special permission of the developer, obtained a mini-cam to show the Union. (A. 265-266; 48-49, 162-163.) As a result of these disclosures, the Union agreed to a number of contractual changes; these enabled the Company to gain a competitive advantage over the other two major networks with respect to news gathering and production techniques. In the news area, especially, the Company gained considerable lead time in the shift to

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2/ The ENG, or electronic news gathering camera, that the Company planned to use was smaller, lighter and less cumbersome than that generally available to the broadcast industry at that time. (A. 151, 163.)

the electronic news gathering cameras, while its competitors still relied on newsreel film. (A. 265; 50-51, 164-168, 261.) 3/

There was no written restriction on the Union's use of the information disclosed by the Company in the 1972 negotiations, but the Union recognized and understood the confidential nature of the Company's information as to the new electronic technology and the business plans for its use. The Union did not disclose the confidential information obtained in the 1972 negotiations. (A. 266; 51, 105, 118, 213-217, 243-244; 248.)

During the period following execution of the 1972 agreement, the parties participated in approximately ten quarterly meetings pursuant to Section 2.06 of the 1972 contract. (A. 266; 106, 118, 256.). The Company regarded these meetings as a vehicle for the continued presentation of its plan for the use of newly-developed electronic technology. (A. 169.) In these quarterly meetings, which were never attended by representatives of NABET, the Company made further disclosures as to its confidential business plans and trade secrets. Again recognizing the confidential nature of this information, as in the 1972 negotiations, the Union preserved the confidentiality of the material presented by the Company at these sessions. (A. 266; 51, 118-121, 217, 248.)

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3/ The Company, for example, was the only news medium to provide electronic news coverage of President Nixon's 1974 trip to the Middle East. (A. 166-167.)

B. The Company Plans to Disclose Confidential Information to the Union Again in the 1975 Negotiations

Prior to the expiration of the 1972 contract on September 30, 1975, the Company conducted a study, as it had done in 1972, to determine if additional contractual changes would be necessary to accomodate new technological advances and the Company's plans to utilize new electronic equipment (A. 169-170). As a result, the Company planned to propose changes in the Union's jurisdiction over three new electronic input devices to allow the use of these devices by non-technicians (A. 266; 170-171, 203-205, 222, 255). In the news field, the Company intended to submit proposals modifying contractual restrictions on the use of personnel in at least four areas, as part of its continuing plan for full conversion from film to all-electronic news coverage (A. 266; 170, 205-208, 222, 255).[4/]

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4/ The availability of a new, much smaller camera enabled the Company to accelerate its plans for conversion from film to full-scale use of electronic news gathering devices on a world-wide basis (A. 205-206). To facilitate these plans, the Company intended to make proposals for such contractual changes as (1) the establishment of the Company's right to hire free-lance technicians within a 200-mile radius of each station; (2) the establishment of an overseas rate for technicians; (3) modification in the restrictions as to meal periods; and (4) schedule revisions as to work days and days off (A. 206-208).

The Company planned to provide the Union with confidential information regarding these proposed changes, as it had done in 1972 (A. 266; 203-208, 255).[5/] Specifically, the Company intended to disclose information as to its three new input devices--these devices were not available to its competitors--and about the Company's plans for integrated use of this equipment. (A. 266; 53, 171, 203-205.)[6/] Likewise, in the news field, the Company intended to support its proposals with confidential information as to its plans for accelerated conversion to an all-electronic news gathering operation, for the use of a new camera that was not generally available, and for the use of a new preliminary editing device for electronic news. The Company was also going to provide detailed information as to the use of this equipment and

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5/ The parties have agreed to the following stipulation (A. 255):

> Stipulated that during the course of the negotiations the Company intended to present information as to new equipment, and processes that come within the category of trade secrets and confidential business plans which would give the Company a competitive advantage over other broadcasters. It is further stipulated that the introduction and use of such new equipment and processes might require changes in the terms and conditions of employment as set forth in the collective-bargaining agreement between the Company and IBEW.

6/ One of the devices the Company planned to discuss, a freehand device called an electronic palette, had been kept secret within the Company itself (A. 171, 205).

the number of employees that would be involved in its conversion to electronic news, with specific regard to the Company's plans for coverage of the political conventions and elections in 1976. (A. 266; 54-55, 206-207, 255).

The Company believed that confidentiality as to this information was imperative for it to gain lead time over its competitors, and it is undisputed that confidentiality concerning the Company's trade secrets and business plans for the use of the new technology available to it could give the Company a competitive advantage over its two key rivals, ABC and NBC (A. 266; 184, 205-207, 255).

C. The Union Insists on the Presence of NABET Officials During the 1975 Negotiations

The 1975 negotiations were scheduled to begin in mid-July of that year (A. 266; 79, 177). Approximately one month before that time, James F. Sirmons, a Company vice-president and its chief negotiator, telephoned Andrew J. Draghi, the chairman of the Union's negotiating committee. (A. 77, 79-80, 129, 135, 146-147, 179). Sirmons asked Draghi about rumors that the Union would have representatives of NABET and the International Alliance of Theatrical Stage Employees (IATSE) on its negotiating committee during the upcoming negotiations (A. 80 ). Individuals from these labor organizations had never before been members of the Union's bargaining committee in negotiations with the Company, and Sirmons expressed concern that their presence would impede the bargaining process (A. 266; 81, 124, 181). Draghi confirmed that representatives

of IATSE and NABET had been invited. He told Sirmons that "that was the way it was, and that was going to be." (A. 80.)

On July 14, 1975, the Company and the Union commenced collective-bargaining negotiations in Ossining, New York, for a new contract (A. 266; 79, 171). No representatives of other labor organizations were present. The Company and the Union reviewed and discussed their initial contract proposals at this two-day session. At this session the Company disclosed no confidential information to support its positions. (A. 266; 79, 81-83, 171-172, 177, 223-224, 257-260.)

The Company and the Union resumed negotiations on September 3, 1975, in San Diego, California (A. 266; 83-84, 86, 178-179). The following day--for the first time in over 35 years of bargaining history with the Company--the Union introduced as members of its negotiating committee persons who were affiliated with another labor organization: Frank Barnhart and Dick Nimmo of IATSE (A. 266; 78, 85-86, 124, 179, 181). Sirmons objected to their presence on the ground that negotiations might be impeded because of a difference in the jurisdictional interests of these two labor organizations (A. 266; 86-88, 181-182).[7/]

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7/ While IATSE has jurisdiction over film work (A. 153), the Company, as noted above, was planning to make contract proposals to the Union that would enable it to accelerate its plan to convert from the use of newsreel film to electronic news coverage (A. 170, 205-206).

Recognizing, however, that IATSE represented some Company employees and was signatory to Company contracts, the Company did continue to bargain while the two representatives of IATSE were present on September 4 and, again, the following day (A. 266; 88-90, 136, 182-183).

Bargaining was scheduled to continue on September 8, and on that day, for the first time, the Union introduced as a member of its bargaining committee an official of NABET, James Nolan, a vice-president and International representative of that labor organization (A. 266; 78, 90-91, 183, 217). 8/ Sirmons objected to Nolan's presence because, unlike IATSE, NABET had no collective bargaining agreements with the Company and did not represent any Company employees, but those of two key competitors, ABC and NBC (A. 267; 75-76, 91-93, 184). Sirmons expressed his concern that since Nolan only dealt with the Company's archrivals, the continued presence of this NABET official would impede the flow of information and the bargaining process. He indicated his doubt that the Company could continue negotiations in Nolan's presence, because support of the Company's bargaining proposals required the disclosure of

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8/ On that day only, Sherry Wolfe was also present as a member of the Union's negotiating committee. Ms. Wolfe worked for an independent radio station, but because of her affiliation with the Union, the Company did not seriously object to her presence during the negotiations. (A. 267; 90-91, 136-137, 183, 186.)

highly confidential technological matters and business plans, which might be revealed by NABET to the Company's competitors. (A. 91-93, 184-185, 211-212, 233, 237.)

After this session, later in the day, Sirmons called Draghi to request a side bar meeting, and he met alone with Draghi that evening. Noting that there were a number of confidential areas the Company felt they had to discuss, Sirmons, at this meeting, again expressed his concern about Nolan's continued presence. Draghi told him that he did not see any way the Union could do without Nolan as a member of its bargaining committee. Sirmons then indicated that he needed more time to discuss this matter and suggested that it should be put off until the next day's scheduled meeting. (A. 93-94, 185, 187-188, 241-242.)

In the meetings that followed on a prearranged schedule between September 9 and 30, 1975, the Union continued to insist upon the participation of a NABET official during the negotiations. The Company, concerned about the possible disclosure of confidential information, responded by filing an unfair labor practice charge challenging the presence of NABET, 9/ and refused to discuss contract proposals while a member of that labor organization was present. (A. 267; 98, 103, 110-112, 114, 117, 185-186, 233.)

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9/ The Company's charge against the Union, filed on September 9, was rejected by the Regional Director and an appeal to the General Counsel was denied (A. 267; 55, 185-186). The Union's original charge in this proceeding was filed on September 11, 1975 (A. 4), and amended on September 16 (A. 7).

During these meetings, the Company engaged in collective bargaining negotiations with the Union only on September 22, when the NABET representative was absent from the room. At this time and for the remaining September meetings, the NABET representative on the Union's negotiating committee was Ed Lynch, International president of NABET, who had replaced Nolan at the September 19 meeting.[10/] When Lynch returned to the room the discussion of contract proposals ceased. (A. 267; 110-112, 191-192.)

D. The Parties Fail to Resolve Their Bargaining Dispute as to NABET

During September, Sirmons repeatedly contacted Draghi to seek ways to get the negotiations moving, and in continuing side bar discussions, off the record, as well as at the bargaining table, both the Company and the Union sought to resolve their dispute as to the presence of NABET (A. 95-105, 112-113, 137-138, 187-189). At one point, the Company proposed continuing negotiations without NABET, while preserving each side's legal position (A. 95, 137, 144-145, 187). The Union suggested that the parties discuss in the presence of the NABET official only those proposals that would not require the disclosure of confidential information, or only the Union's proposals (A. 267; 95-97, 100-101, 110, 190-191, 221-222).

The Company rejected this alternative on the basis that meaningful collective bargaining requires a give and take balance of respective positions, with an ultimate contract resting on the entire composite

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10/ On or about this date, and thereafter, the representatives of IATSE no longer attended the negotiations (A. 267; 192).

picture of proposals (A. 267; 190-191, 209, 221-223). Maintaining this viewpoint, the Company repeatedly explained that its proposals for revision of the contract "so permeated the entire negotiation" that separation would not be feasible,[11/] that the Company and Union proposals had to be considered together, and that it would not allow the Union to pick and choose only the non-confidential issues for negotiation, because those important issues requiring the disclosure of confidential information could not be separated from the normal quid pro quo bargaining process without prejudice to the Company's proposals (A. 96-98, 100-101, 190-191, 209, 221-224, 242, 245-246).

At the September 16 meeting, because of the Company's "persistant references to confidentiality," Draghi proposed that a general pledge of confidentiality as to the Company's business plans and technical data be executed by all sides, including the NABET representative (A. 269; 104-105, 138-139, 143-144, 189-190, 217-220, 242). Discussing this

11/ The Union's 1975 proposals for modification of the contract (A. 257-260) included expansion of its work and territorial jurisdiction, increased restrictions regarding sub-contracting, meal programs and work scheduling as to days off and overtime, and for provision of technical directors in connection with ENG Operations. (See Union proposals Nos. 2-6, 9, 12-13, 23.) These major noneconomic proposals of the Union entailed discussion of the same subject matter involving confidential information as many of the Company's proposals to accelerate its conversion to all-electronic news coverage. (See page 6, n. 3, supra.)

proposal, Draghi noted that the Union had consistently maintained the confidentiality of the Company's information in the past.[12/] Sirmons acknowledged this, but asked what kind of binding assurance would such a pledge be against breach by NABET, whose vital interests were different (A. 104-109, 189-190, 219-221). Sirmons expressed the Company's concern that such a pledge would not be adequate protection against the irreparable harm the Company believed would be caused by the disclosure of its confidential information. He asked for specifics as to the size of any bond that would be posted by NABET and as to what other remedial measures could be realistically imposed to assure compliance by NABET, whose vital interest was in the well-being of employees of the Company's competitors. (A. 269; 104-105, 189-190, 218-220, 233.) Draghi proposed that the parties agree on the pledge first and work out the details later, but Sirmons indicated that the Company could not accept the pledge without more specific information as to the bond and other remedial measures (A. 109, 218-220). The discussion ended without the Union presenting a detailed proposal (A. 267; 189-190, 219-220, 243, 245).

12/ As the Union notes in its brief (page 10), Draghi recalled an incident in the past when the Company had allowed Gary Blum, who worked for a competitor, to attend one of the quarterly meetings and there had been no breach of confidentiality (A. 108-109). The Union states that Sirmons "remained unmoved" by Draghi's reminder (Br. 10), but it must be noted that while Blum worked for a competitor, unlike the NABET officials, he was affiliated with the Union (A. 108-109, 141-142).

On or about September 24, the Company proposed that the parties meet, without NABET, in subcommittees to exchange information pending agreement on a new contract (A. 267-268; 112-113, 137-138, 188, 229-230). Specifically, the Company sought to exchange information as to benefits and pensions (A. 188, 229-230).[13/] The Union declined, stating that all the negotiations had to take place across the bargaining table and in the presence of a representative of NABET (A. 268; 113-114, 188).

Thereafter, the Company and the Union reached an interim agreement to extend the 1972 contract for a 5-month period through February 29, 1976 (A. 268; 114-117, 230-233, 262-263). The Company and the Union exchanged proposals as to this extension of the old contract in the presence of the NABET representative, Lynch. The Union also made a proposal as to retroactive wage and benefits, but the Company, maintaining its refusal to fragment the bargaining process as to substantive matters, would not discuss the issue of retroactivity in front of Lynch. Subsequently, the Company and the Union reached agreement as to extension of the contract and retroactivity, outside the presence of any NABET official. (A. 114-117, 230-233, 262-263.)

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13/ Draghi testified that Sirmons told him that "what we did as far as passing on this information to Mr. Lynch outside of the committee meetings was up to us" (A. 112-113). The record does not support the Union's statement (Br. 11) that "Sirmons stated that he didn't care what the IBEW did as far as passing on any information imparted at bargaining sessions to Lynch, as long as that was done outside the actual negotiating session." (Emphasis added.)

E. The Parties Resume Bargaining Without NABET in 1976

The Company and the Union resumed negotiations in 1976, without the presence of representatives from any other labor organization. Bargaining sessions took place in Santa Barbara, California, between January 6 and 21, and later in San Diego between January 28 and February 4. (A. 268; 117, 192-193.) During these meetings, the Company noted the need for confidentiality and presented to the Union the same proposals and supporting confidential information, which it had intended to present during the 1975 meetings. Approximately 75 percent of the bargaining time in 1976 was taken up by discussion of these proposals and the Company's confidential supporting data. (A. 268; 192-193, 208, 210, 236, 255.) 14/

14/ No agreement was reached at that time (A. 142-143). Subsequent to the unfair labor practice hearing in this case, the Company and the Union did enter into a new collective bargaining agreement, covering a three-year period from October 1, 1975, to September 30, 1978. (See Union Brief, page 12, n. 7.)

## II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the facts set forth above, the Board unanimously affirmed the rulings, findings and conclusion of the Administrative Law Judge, who held that in "the unique circumstances of this case," the Company's refusal to bargain was not unlawful because the presence of NABET on the Union's bargaining committee during the 1975 negotiations posed "a clear and present danger to meaningful collective bargaining" (A. 271; 268-269). Explaining this danger, the Administrative Law Judge found that the Company's refusal to bargain was warranted because NABET represented only employees of the Company's archrivals, ABC and NBC; NABET's primary allegiance was to the employees of these competitors; and the Union's pledge of confidentiality was accordingly not adequate protection against a breach by NABET, which "would have caused irreparable injury by depriving the [Company] of competitive advantages" (A. 268-269). For these reasons, the Administrative Law Judge recommended dismissal of the complaint against the Company in its entirety; the Board unanimously adopted this recommendation (A. 272; 268-270).[15/]

15/ The Board, however, rejected any suggestion by the Administrative Law Judge that the Union was acting in bad faith by insisting that NABET be part of its bargaining team (A. 271 n. 1). Moreover, the Board did not adopt the Administrative Law Judge's comment that its duty of fair representation might impose upon NABET an affirmative duty to disclose any information received on a confidential basis as a result of its participation in the negotiations (A. 271, n. 1; 268).

## ARGUMENT

### THE BOARD PROPERLY FOUND THAT THE COMPANY HAD NOT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION IN THE PRESENCE OF REPRESENTATIVES OF ANOTHER LABOR ORGANIZATION WHICH HAD NO CONTRACTUAL RELATIONSHIP WITH THE COMPANY, WHICH REPRESENTED NONE OF THE COMPANY'S EMPLOYEES, BUT WHICH REPRESENTED EMPLOYEES OF THE COMPANY'S TWO KEY COMPETITORS.

#### A. The Right to Choose a Bargaining Representative is Not Absolute

There is no question that the Act protects the right of each party to the collective bargaining process to choose its bargaining representative, and that the Act imposes upon the other party the correlative duty to negotiate with this chosen bargaining representative. E.g., General Electric Company v. N.L.R.B., 412 F. 2d 512, 516-517 (C.A. 2, 1969), enforcing in pertinent part, 173 NLRB 253, 254-255 (1968); N.L.R.B. v. International Ladies' Garment Wkrs.' Union, 274 F. 2d 376, 378 (C.A. 3, 1960); N.L.R.B. v. Kentucky Utilities Co., 182 F. 2d 810, 812-813, 814 (C.A. 6, 1950). As this Court explained in the General Electric case, supra (412 F. 2d at 516-517):

> Section 7 of the National Labor Relations Act . . . guarantees certain rights to employees, including the right to join together in labor organizations and "to bargain collectively through representatives of their own choosing." This right of employees and the corresponding right of employers, see Section 8(b)(1)(B) of the Act, . . . to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme. In general, either side can choose as it sees fit and neither side can control the other's selection, a proposition confirmed in a number of opinions, some of fairly ancient vintage.

Yet, these rights as to the choice of a bargaining representative are not "absolute or immutable" (N.L.R.B. v. International Ladies' Garment Wkrs.' Union, supra, 274 F. 2d at 378), and it is well established that in unusual circumstances an employer may lawfully object to some agent or representative presented by a union for bargaining. See, e.g., Standard Oil Company v. N.L.R.B., 322 F. 2d 40, 44 (C.A. 6, 1963); N.L.R.B. v. Roscoe Skipper, Inc., 213 F. 2d 793, 794 (C.A. 5, 1954), enforcing 106 NLRB 1238, 1241 (1953). Past examples of such circumstances that have been cited by the Board are "situations where the chosen representative is so tainted with conflict or so patently obnoxious as to negate the possibility of good-faith bargaining." General Electric Co., supra, 173 NLRB at 254.

Thus, in N.L.R.B. v. Kentucky Utilities Co., supra, 182 F. 2d at 813-814, the court ruled that the employer's refusal to bargain was not unlawful in light of the blatant hostility toward the employer expressed by one of the union's negotiators. The Court held (182 F. 2d at 813):

> The duty to bargain collectively presupposes negotiations between the parties carried on in good faith, with a common willingness among the parties to discuss freely and fully their respective claims and demands and, when they are opposed, justify them on reason . . . . Collective bargaining is a two-sided proposition; it does not exist unless both parties enter the negotiations in a good faith effort to reach a satisfactory agreement . . . . [The union negotiator's] expressed hostility and his purpose to destroy the [employer] made any attempt at good faith collective bargaining a futility.

In Bausch & Lomb Optical Company, 108 NLRB 1555, 1561 (1954), the right of an employer to refuse to bargain was upheld by the Board

because the union was engaged in a competing business and the existence of this direct business rivalry "would drastically change the climate at the bargaining table . . . to one in which, at best, intensified distrust of the Union's motives would be engendered." The Board's explanation has direct bearing on the present proceeding (108 NLRB at 1562):

> We do not believe it is incumbent upon the Board to hold, in a situation such as is involved here, which possesses latent dangers, that merely because the hazards which can be anticipated have not yet been realized, the Respondent-employer is nonetheless under a statutory duty to bargain. We do not mean to imply that given the opportunity the Union would inevitably take advantage of its position in the manner heretofore indicated. It is enough for us that it could and that the temptation is too great.

Again in an analogous situation, when an ex-union official was added to the employer association's bargaining committee, avowedly to "put one over on the union," the court ruled that the union's refusal to bargain was not unlawful. N.L.R.B. v. International Ladies' Garment Workers' Union, supra, 274 F. 2d at 378-379. The court, quoting the Board's Bausch & Lomb language, supra, (108 NLRB at 1561), noted that participation by this ex-union official "would result in bargaining in which, 'at best, intensified distrust of the . . . [Association's] motives would be engendered'." 274 F. 2d at 379. 16/

Reviewing these cases wherein the bargaining environment has been "so infected with ill-will, . . . or conflict of interest as to make good-faith bargaining impractical," this Court has recognized

16/ But see N.L.R.B. v. Brotherhood of Teamsters, etc. Local No. 70, 459 F. 2d 694, 696-697 (C.A. 9, 1972).

that the right to choose a bargaining representative must be balanced against the basic policy of the Act to promote meaningful bargaining. It has held that one may object lawfully to the representatives selected by the other party if a showing is made of "a clear and present danger to the bargaining process." See General Electric Company v. N.L.R.B., supra, 412 F. 2d at 517, 520.

Of course, such a balancing of conflicting interests and policies relative to collective bargaining is primarily the responsibility of the Board which has the "special function of applying the general provisions of the Act to the complexities of industrial life." See N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 266-267 (1975), and cases cited. As we show below, the Board has properly exercised that function in the "unique circumstances" (A. 268) of the instant case, where the Company has demonstrated that, because of its compelling concern with confidentiality, the presence of NABET constituted a clear and present danger to the bargaining process.

B. In Light of the Need for Confidentiality, the Presence of NABET Constituted a Clear and Present Danger to the Bargaining Process

As shown in the Counterstatement, the Company immediately and repeatedly objected to the presence of NABET at the bargaining table because of its concern about disclosure to its competitors of confidential information which the Company intended to present in support of its contract proposals. Confidentiality was the "compelling reason" (A. 212)

for the Company's stand and the record shows that a unique conjunction of factors warranted the Company's concern.

The first factor was the Company's pre-eminent position in developing and exploiting the technology of broadcasting. Entering the 1975 negotiations, the Company already enjoyed a competitive advantage, especially in the news area, where it had considerable lead time in the shift to all-electronic news coverage. As the 1975 negotiations approached, the Company was developing plans to maintain its technological leadership with the use of a new, smaller mini-cam and three new input devices, all not yet available to its competitors. It is undisputed that if these trade secrets and the Company's business plans for their use could be kept secret, the Company competitive advantage would be enhanced (A. 255). As the Board found, the disclosure of this information to the other networks would have caused substantial injury to the Company's prospects (A. 269).

Second, notwithstanding its vital interest in secrecy, the Company was committed to make full disclosure to the Union about its new equipment and its utilization plans as a crucial element of the 1975 negotiations. Specifically, as shown at pp. 7-8, the Company proposed to present detailed information about how its new input devices and new mini-cam would be used to cover the 1976 political convention and the general election, and about its continuing shift from the use of newsreel to all electronic news coverages. Such disclosure was, as the Company recognized, unavoidable if it was to persuade the

Union of the need to modify established working practices which otherwise would impede the fullest exploitation of the new technology.

Third, the situation of NABET as a proposed participant in the negotiations was unique. On one hand, it represented the employees of the Company's arch-rivals. On the other, it represented none of the Company's employees. The Union, because it represented the Company's employees, had a direct interest in the Company's economic prospects, hence an incentive to keep its plans secret. Furthermore, any breach of confidentiality might destroy the Company's trust, closing off once and for all the Union's access to information which was vital to the welfare of its members. During the 1972 contract negotiations and thereafter, the Union had shown itself entitled to the Company's trust.

In contrast, as the Board said, NABET's "primary allegiance [was] to [its] constituents who were employed by the two archrivals of [the Company]" (A. 269). The Company's secret technology posed a direct and immediate threat to the well being of NABET's membership --a fact the NABET representatives could not overlook if they were privy to the 1975 negotiations. Furthermore, the temptation to breach the confidentiality of this Company's disclosures would not be offset by any sense of obligation to the Company's employees on NABET's part.[17/]

17/ As the Board noted in the Bausch & Lomb case, supra, (108 NLRB at 1562): "We do not mean to imply that given the opportunity the Union would inevitably take advantage of its position . . . . It is enough for us that it could and that the temptation is too great."

Given these circumstances, the Company could reasonably fear that if NABET was seated at the bargaining table, the temptation to disclose the Company's secrets would be impossible for NABET to resist. Accordingly, the Company might well decide that it could not afford to air its most crucial innovations. Withholding this information, however, would prejudice its chance to gain the Union's consent to the changes in working conditions which the Company needed to institute if its plans were to succeed. And all this adds up, of course, to negotiations made significantly mere difficult by virtue of NABET's presence.

These considerations, which support the Company's refusal to bargain with NABET at the bargaining table, are not matched by similar reasons of substance on the Union's side. Obviously, NABET representatives would have no expertise to put at the Union's disposal when the negotiations were in their most crucial phase--discussion of the changes in working practices made necessary by the new technology. Nor is the situation different with respect to more exclusively economic issues. There is no need for coordination between the Union and NABET to defend against "whip-sawing" by the Company since NABET represents no other Company employees who might be affected by the outcome of these negotiations. Compare N.L.R.B. v. General Electric Co., supra, 412 F. 2d at 514, 518-519. See also the Board's finding in that case that "it is highly significant that the Unions which have joined together . . . have traditionally received similar offers and

additionally, have executed similar agreements with the Respondent." 173 NLRB at 255. Furthermore, since the record is devoid of evidence that the Company has ever coordinated its bargaining positions with those of the rival networks, there is no occasion for the Union to concert its actions with NABET for the sake of greater strength. In short, the Union's invocation of General Electric--its claim that its justification for having NABET alongside was "essentially the same as the reasons such representatives were included in General Electric" (Br. 21)--does not stand scrutiny. The facts here are critically different from those in General Electric; the General Electric rationale is inapplicable; and the Union has tendered no new considerations which might be found to over-balance the legitimate and substantial interests on the Company's side.[18/]

The other cases cited by the Union are also readily distinguishable (Br. 28-29). The case most closely in point, Independent Drugstore Owners of Santa Clara County, 170 NLRB 1699 (1968),

18/ General Electric is one of a series of cases involving "outsiders" on union bargaining committees who are affiliated with unions that have contractual relationships with the employer, but who are not parties to the contract being negotiated. See, e.g., Minnesota Mining & Mfg. Co. v. N.L.R.B., 415 F. 2d 174, 177-178 (C.A. 8, 1969); Standard Oil Co. v. N.L.R.B., supra, 322 F. 2d at 43-44; N.L.R.B. v. Deena Artware, 198 F. 2d 645, 648, 650-651 (C.A. 6, 1952), cert. denied, 345 U.S. 906; Harley Davidson Motor Company, 214 NLRB 433 (1974). There is no dispute as to the principle set forth in these cases that an employer cannot refuse to bargain with a union merely because a mixed-union bargaining committee includes such outsiders who are representatives of other bargaining units, or who also represent the employees of competitors. Of course, none of these cases involves an "outsider" who, like the NABET representative, represents only the employees of competitors. Nor do any of them present the unique secrecy factor which distinguishes this case.

(Un. Br. 28-29) did involve, as a member of the bargaining committee, a union official, Tupper, who represented none of the employer's employees, but did represent the employees of competitors. In that case, nowever, the bargaining employer initially objected to Tupper's presence solely on that ground (id. at 1701). To be sure, in argument the employer urged that such matters as "volume of business, cost of business, profits and losses, business practices, and future plans of business development" might be discussed at negotiations and that Tupper might pass them on, although the employer suggested no reason why Tupper would do so. Such speculation, however, is obviously no substitute for the direct evidence here that specific confidential information would necessarily be brought to the bargaining table with respect to the most critical items as to which agreement would be sought and that such information bore directly on the employment opportunities of all three groups of employees--that is, those of CBS, ABC and NBC--in this highly competitive industry.

C. The Union's other contentions lack merit

There is no basis for the Union's charge (Br. 17, 26-27, 31-32) that the Company's avowed concern about confidentiality in reality masked an irrational distaste for "outsiders." From the first appearance of NABET representative Nolan at the bargaining table the Company indicated its anxiety about its secrets getting out; and thereafter, in private meetings as well as at the bargaining table, Sirmons,

the Company's chief negotiator, expressly based his objection to NABET on the ground of possible misuse of confidential information by this union which had divergent interests. Union representative Draghi conceded that Sirmons, the Company's chief negotiator, made "persistent references to confidentiality" (A. 104).[19/]

Nor is it probative of the Company's alleged prejudice that it objected initially to the presence of an IATSE representative. Since the Company's plans to phase out newsreel operations posed a threat to the job security of IATSE's members, it was reasonable for Company representatives to feel some constraint at the prospect of IATSE's presence. What is more significant, in any event, is that the Company quickly retracted its objection to a unionist who, unlike NABET's Nolan, represented some Company employees.

Nor does it advance the Union's position to point out (Br. 32-33) that it offered the Company, without success, a general pledge of confidentiality which would extend to NABET representatives. The Company could reasonably believe that the pledge fell short of giving it the necessary assurance against a breach of secrecy by NABET, considering

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19/ Attempting to discredit Sirmon's testimony on this issue, the Union misquotes him. Thus when asked about the Company's objections to NABET, Sirmons noted that, while fear of disclosure was one compelling concern, the Company also raised broader objections. His words at one point were (A. 212): ". . . we raised much broader objections than that and did not face that question in that way." [Emphasis added.] Compare Union brief, page 13, where Sirmons is quoted as saying that the Company "did not face that question in any way." [Emphasis added.] The Administrative Law Judge, it should be noted, found Sirmons "an impressive witness" (A. 268).

the pressure on NABET to breach its vow of secrecy, as well as the serious consequences of such a breach. Even if the pledge had been backed up by some form of sanction, NABET might still be inclined to break secrecy when it considered the difficulty of proving which participant was responsible for the leak. Further, as the Counterstatement shows, pp. 13-14, the Union came forward with no detailed proposal to make the pledge effective, even though the Company raised the question of enforcement.

Finally, there is no merit to the Union's suggestion (Br. 32) that the Company had a duty at least to allow NABET to sit at the bargaining table during the discussion of matters unrelated to the new technology or the Company's plans. This ignores how much the bargaining process was permeated by these confidential issues; Sirmons estimated without contradiction that when negotiations finally took place in 1976 (without NABET), 75 percent of the time was devoted to to confidential issues. It was not unreasonable for the Company negotiators to fear that their attention would be diverted from the substance of the negotiations if they had to be on their guard constantly against a confidential disclosure made without sending the NABET representative from the room. Furthermore, the basic premise of the Union's proposal--that it was feasible to identify and compartmentalize the "secret" and non-secret" issues--is false to the essence of collective bargaining. It has been recognized again and again that meaningful bargaining entails a give-and-take

balancing of the respective positions on all subjects until the ultimate equilibrium is attained. Cf. Federal Mogul Corporations, 212 NLRB 950, 951 (1974), enforced, 524 F. 2d 37-38 (C.A. 6, 1975). As the Fourth Circuit has explained, "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." Korn Industries, Inc. v. N.L.R.B., 389 F. 2d 117, 121 (1967). See also, as to the interdependence of issues in a bargaining situation, N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217, 223 (1949); Inter-Polymer Industries, Inc., 196 NLRB 729, 761 (1972).

In sum, the Union's contentions are without merit. The Board properly dismissed the complaint against the Company because in the unique circumstances of this case, the presence of NABET at the bargaining table would have constituted a "clear and present danger" to the fruitfulness of the bargaining process.

## CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for review should be denied and that a judgment should be entered affirming the Board's dismissal of the complaint in this proceeding.

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May 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL UNIONS NOS. 1212, 4, 45, 202, 1200, 1220 and 1228, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, | ) | |
| Petitioners, | ) | |
| v. | ) | No. 76-4227 |
| NATIONAL LABOR RELATIONS BOARD, | ) | |
| Respondent, | ) | |
| and | ) | |
| CBS, INC., | ) | |
| Intervenor. | ) | |

CERTIFICATE OF SERVICE

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this 9th day of May, 1977.